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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No. 221

HARRY C. RITTER and CHRIS S. KNAUR,
Petitioners

V.

WYOGA GAS AND OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. FRED KATZMAIER
THOMAS WOOD
WM. H. WOOD
Counsel for Petitioners.

Williamsport, Pa.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners herein respectfully pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, under date of March 4, 1940, upon which judgment said Court refused a rehearing on April 12, 1940.

Opinions of the Courts Below.

(1) The Opinion of the District Court of the United States for the Middle District of Pennsylvania is reported in 27 F. Supp. 35 (1939), and appears in the record at (R-55). This Opinion was filed on April 3, 1939.

The Opinion of the District Court on re-argument is reported in 29 F. Supp. 582 (1939) and appears in the record at (R-62). This Opinion was filed October 7, 1939.

(2) The Opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 110 F. (2d) 524, (1940), and appears in the record of the present proceedings at (R-68). This Opinin was filed on March 4, 1940, and rehearing was denied on April 12, 1940.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 4, 1940. (R-69). The petition for rehearing was filed March 29, 1940, and was denied April 12, 1940 (R-70).

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended, 43 Stat. 938, 28 U. S. C. A. 347.

Question Presented.

The question presented is whether the order of the United States District Court for the Middle District of Pennsylvania, refusing the petitioners' motion to dismiss the complaint for lack of jurisdiction over indispensable parties to an action instituted in said Court on the basis of diversity of citizenship, is interlocutory and not immediately appealable.

Statement of the Case.

The petitioners, together with twenty-four other individuals, are defendants in a suit instituted in the United States District Court for the Middle District of Pennsylvania by the respondent, Wyoga Gas and Oil Corporation.

From shortly after the time the said Wyoga Gas and Oil Corporation was organized on November 28, 1931, until sometime before the present action was instituted, the petitioners and the other defendants, were, at various times, acting as its officers and directors. During this period the plaintiff corporation acquired for development a considerable number of oil and gas leases and interests, most of them from one of the defendants, a certain Geddes H. Schrack.

Control of the plaintiff corporation subsequently passed out of the hands of the defendants, and they were superseded by other officers and directors.

The plaintiff corporation thereupon instituted suit (R-5) against the defendants for the recovery of the damages allegedly suffered by the plaintiff corporation as a result of the defendants' negligence, fraud and misconduct in the transactions just referred to. The plaintiff corporation contended that the defendants had violated the trust imposed in them as officers and directors by making a secret profit in such transactions, and by paying excessive prices for, or otherwise negligently dealing with the leases and interests involved.

The suit was instituted in the Federal District Court for the Middle District of Pennsylvania, since twenty-four of the twenty-six defendants are citizens of and reside in Pennsylvania. However, one of the defendants, Geddes H. Schrack, who was the chief party in

interest in the transactions involved, is a citizen and resident of the State of Ohio (R-7) and another defendant, Bernard Frank, is a citizen and resident of the State of New York (R-7).

Two of the defendants, the petitioners here, moved to dismiss the plaintiff's Complaint (R-53) for the reason that no suit could be maintained in the Federal District Court for the Middle District of Pennsylvania, on the basis of diversity of citizenship unless **all** the defendants were residents of Pennsylvania and the District. It was further maintained by the petitioners that the defendants, Geddes H. Schrack and Bernard Frank, were indispensable parties to the litigation, and that their residence in Ohio and New York ousted the jurisdiction of the Federal District Court for the Middle District of Pennsylvania.

The petitioners contended that the causes of actions averred in the complaint comprehended, not only claims based on alleged joint torts which might result in joint and several liability that could be determined in the absence of the non-resident defendants, but also included claims for accounting and rescission of contract which were inseparably connected with each of the other causes of action and which, under all authorities, could not be determined in the absence of the two non-resident defendants.

The Honorable Albert W. Johnson of the Court below filed an opinion and entered an order on April 3, 1939 (R-55) refusing the motion to dismiss the Complaint and ruling that the Court had jurisdiction to entertain the action.

Re-argument was granted and on October 7, 1939, the Court filed a second opinion and entered an order to the same effect as that entered on April 3, 1939 (R-62).

An appeal was thereupon duly taken to the Circuit Court of Appeals for the Third Circuit (R-64). That Court, in an order issued March 4, 1940, held the ruling of the Federal District Court to be merely interlocutory and dismissed the appeal (R-68).

A petition for rehearing was thereafter filed, which petition was refused on April 12, 1940. (R-70).

Basis of Decisions Below.

The ruling of the United States District Court for the Middle District of Pennsylvania, refusing the petitioners' motion to dismiss the complaint for lack of jurisdiction, was based upon the following portion of the Court's opinion (R-57):

> "In the present case the complaint alleges in substance that the defendants are joint tort feasers. Thus, their liability is joint and several. Under these circumstances the interests of the defendants are so far separable that a final decree can be entered without adversely affecting the rights and liabilities of the non-resident defendants. In short, the non-resident defendants are "necessary," as distinguished from "indispensable" parties. Sauer et al. v. Newhouse et al., 24 Fed. Supp. 911."

The ruling of the Circuit Court of Appeals for the Third Circuit, dismissing the petitioners' appeal from the ruling of the United States District Court for the Middle District of Pennsylvania, was based upon the following portion of the Court's opinion (R-69):

> "Our brief recital of the proceedings in the District Court makes it clear that the order appealed from was not a final order but merely interlocutory in its nature. It follows that we are without jurisdiction to entertain the appeal. Grand Trunk Western R. Co. v. McHie, 100 F. 2d 86."

Reasons for Granting Petition.

The Circuit Court of Appeals for the Third Circuit, in dismissing the petitioners' appeal on the ground that it was taken from an interlocutory order, cited only the case of Grand Trunk Western R. Co. vs. McHie, 100 F. 2nd 86 (1938).

The case thus cited indicates only that certain types of orders are interlocutory and may not be made the sole basis of an appeal; it did not, however, involve an order of a lower court determining its own jurisdiction, nor does it contain any reference whatsoever to an order of that type.

The petitioners submit that the order of a Federal District Court determining its own jurisdiction in a case based on diversity of citizenship, is completely different from the ordinary interlocutory order, and is so fundamental that it may always be made the sole basis for an appeal. An erroneous determination by a lower Court that it has jurisdiction renders all subsequent proceedings entirely void, and an appellate review of such an order may not properly be refused on the ground that it is interlocutory.

The respondent's complaint avers nine separate and distinct causes of action in 211 paragraphs. A trial of these alleged causes of action would consume an extended period of time, both of the litigants and of the District Court, and would entail the expenditure of substantial sums of money for costs and expenses. All facts which must be considered in ascertaining whether the two non-resident defendants are indispensable parties, and thus deprive the lower Court of any jurisdiction over the cause, are set forth in the respondent's complaint. The jurisdiction of the District Court to entertain this action is a matter of very con-

siderable doubt, and to postpone determination of this question of jurisdiction until after trial of the case on the merits would be highly inequitable, is not necessitated by any precedents, and will likely result in needless delay and expenditure to all parties concerned.

In refusing to determine the petitioners' appeal on its merits, the Circuit Court of Appeals for the Third Circuit has so far departed from the accepted course of judicial proceedings as to call for an exercise of your Honorable Court's power of supervision.

Wherefore, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, requiring that Court to certify the whole record and the case herein to this Court for its review and determination.

HARRY C. RITTER

CHRIS S. KNAUR,
Petitioners.

J. FRED KATZMAIER

THOMAS WOOD

WM. H. WOOD,
Counsel for Petitioners.

STATE OF PENNSYLVANIA
COUNTY OF LYCOMING SS:

Thomas Wood, being duly sworn according to law, deposes and says: I am counsel for the petitioners herein; I have read with within petition and know the contents thereof; all the allegations in the said petition are true to the best of my knowledge, information and belief.

THOMAS WOOD

Sworn and subscribed before me this day of July, 1940.

CHARLOTTE L. KELLER,
Notary Public.

My Commission Expires
August 16, 1942.

Certificate of Counsel.

I hereby certify that the foregoing petition is, in my opinion, well founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

THOMAS WOOD,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No.

HARRY C. RITTER and CHRIS KNAUR,
Petitioners

V.

WYOGA GAS AND OIL CORPORATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below.

(Set forth page 2 supra)

Jurisdiction.

(Set forth page 2 supra)

Statement of the Case.

(Set forth page 3 supra)

Specification of Error.

The Circuit Court of Appeals for the Third Circuit erred in dismissing the petitioners' appeal on the ground that the order appealed from is an interlocutory one which may not be made the sole basis of an appeal.

Argument.

The petitioners are seeking an exercise of the supervisory powers of your Honorable Court for the correction of an error of the Circuit Court of Appeals made in refusing to determine the merits of the petitioners' motion to dismiss the complaint, which motion goes to the very jurisdiction of the Federal District Court to entertain the cause.

It is submitted that a well founded objection to the jurisdiction of a Federal District Court to determine a case instituted therein on the basis of diversity of citizenship is of such a nature that it may be made the sole basis of an immediate appeal, and that such appeal must be determined on its merits by the Circuit Court of Appeals.

It is fundamental that the right to sue in a Federal District Court on the ground that there is a controversy between the citizens of different states is not derived from the Constitution, but from Congress, and must be exercised within the limitations established. See Kline v. Burke Constr. Co. 260 U. S. 226, S. Ct. 79, 67 L. ed. 226 (1922).

With respect to the jurisdiction of Federal District Courts on the basis of diversity of citizenship, section 51 of the Judicial Code, 28 U. S. C. A. 112, provides in part as follows:

> "***but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;"

It is established by the decisions construing this Section of the Judicial Code that, if suit is instituted in the District Court of the State and district in which the defendants reside, such state and district must be the residence of **all the defendants.**

In Simkins Federal Practice, Revised Edition, Sec. 397, page 305, this principle is expressed as follows:

> "This means that where there is more than one plaintiff, or more than one defendant, in **personal actions,** suit must be brought in the **State** and **district** in which all the plaintiffs are inhabitants, if brought in plaintiffs' residence district, or where all the defendants are inhabitants, if brought in defendants' residence district."

To the same effect, see the case of Smith vs. Lyon, 133 U. S., 315, 33 L. ed. 635, 10 S. Ct. 303 (1890).

When one or more defendants are not residents of the state and district in which suit was brought, and in which the co-defendants reside, jurisdiction is sometimes maintained by dismissing the suit as to the non-resident defendants. However, this may not be done, and jurisdiction is ousted if any of the non-resident defendants are indispensable parties.

Referring again to Simkins Federal Practice, Revised Edition, the following statement appears in Section 507, page 464:

> "If then the issue arises that parties who are indispensable, have not been joined, or it should so appear during the trial, the court must either dismiss the case or hold it until they are made parties; **and if to make them parties would destroy the diversity of citizenship, and thereby oust the jurisdiction of the court, then the court cannot enter-**

tain jurisdiction of that case, and should dismiss at once, for the court cannot proceed if the absent defendants are indispensable."

In the case of Waterman v. Canal-Louisiana Bank and Trust Co., et al., 30 Sup. Ct. 10, 215, U. S. 33, 54, Law, Ed. 80, (1909), the Court commented as follows upon the issue of indispensable parties in a suit instituted in a Federal Court on the basis of diversity of citizenship:

> "And there is a third class whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In accordance with these principles governing the jurisdiction of Federal District Courts, the petitioners moved to dismiss the complaint for lack of jurisdiction. This motion was based upon the fact that two of the defendants, who are indispensable parties to the litigation, are not residents of the State and District in which suit was brought. (R-53).

As has already been indicated, the petitioners contended that the causes of action averred in the complaint comprehended, not only claims based on alleged joint torts which might result in joint and several liability that could be determined in the absence of the non-resident defendants, but also included claims for accounting and rescission of contract which were inseparably connected with each of the other causes of action and which, under all authorities, could not be determined in the absence of the two non-resident defendants.

The issue thus raised by the petitioners is fundamental, and upon its determination depends whether the proceedings in the Federal District Court are a nullity, and whether the District Court has any jurisdiction whatsoever to hear and determine the cause.

Instead of deciding the merits of this issue on appeal, the Circuit Court of Appeals dismissed the appeal on the ground that the order appealed from was interlocutory, citing as authority only the case of Grand Trunk Western Ry. Co. v. McHie, 100F 2nd. 86 (1938).

It is submitted that this action of the Circuit Court of Appeals is clearly erroneous and calls for an exercise of your Honorable Courts' supervisory and corrective powers.

An order overruling a well founded objection to the jurisdiction of a Federal District Court, particularly when based upon the allegations of the plaintiff's complaint, is not within the category of an interlocutory order. The jurisdiction of the Court to proceed in a case of this type is such a fundamental and indispensable requirement that any order assuming jurisdiction, over the objection of the defendant is a finality in its legal significance and must be determined on the merits if appealed from.

See: Salem Kings Products Co. vs. LaFollette, Ore. 196 Pac. 416 (1921).

Furthermore, an order overruling an objection to the jurisdiction of a Federal District Court to entertain a suit based on diversity of citizenship, even if superficially similar to an interlocutory order, is not within the intent of the rule which prohibits preliminary appellate review of interlocutory orders.

It has long been the policy of Appellate Courts to dismiss appeals from purely interlocutory orders, and to save needless expense and delay by postponing any review of such orders until the entire case has been determined by the court of original jurisdiction.

However, in a case such as that here presented by the petitioners, where the order appealed from determines the jurisdiction of the Federal Court to entertain the case, the refusal of the Circuit Court to decide the appeal on its merits may well cause tremendous unnecessary expense and hardship to both the parties and to the Federal District Court.

The plaintiff's complaint avers nine causes of action, each of which is very complex in nature. More than two hundred numbered paragraphs are necessary to set forth these causes of action, and it will require a considerable period of time and a large number of witnesses to present the proof which will be necessary in connection with these averments.

If the parties are forced to proceed with the trial of the case, and it is then confirmed that the Federal Court had no jurisdiction, large sums will have been wasted in costs and attorneys fees, and the valuable time of the trial court, and the twenty-six defendants will have been unnecessarily consumed.

It might be pointed out that, in recognition of the hardships which exist in situations of this type, the State Appellate Courts of the district have been directed to determine, on their merits, appeals based solely on orders of inferior courts assuming jurisdiction over the objection of the defendants.

Under the Pennsylvania Act of 1925 P. L. 23, (12 P. S. 672-674,) any question of jurisdiction over the parties defendant or the cause of action, whenever raised in the first instance, may be preliminarily determined by the court, and the decision may be appealed to the Supreme or the Superior Court of the State, as in the case of final judgments.

In the case of Gallagher v. Keystone R. H. Co., et al. 333 Pa. 9 (1939), the Pennsylvania Supreme Court made the following comment relative to the purpose of this statute:

> "While the general rule is that appeals do not lie from such orders, the legislature recognized that parties wrongly brought in should not be put to the expense and inconvenience of a trial on the merits, which had resulted from the rule that such orders were unappealable, and passed the Act of March 5, 1925, P. L. 23, 12 P. S. Section 673, allowing appeals from such interlocutory orders for the limited purpose of questioning, before trial, the jurisdiction over the defendant or of the cause of action for which suit is brought': section 1."

It is submitted that the action of the Circuit Court of Appeals for the Third Circuit, in dismissing the petitioners' appeal without determining the merits of their well founded objection to the Federal Court's jurisdiction was entirely unwarranted and unjustified. The Circuit Court advanced no adequate authority for its ruling, and it is clearly erroneous. The situation is one which merits an exercise of the supervisory and corrective powers of this Honorable Court, and, there-

fore, a writ of certiorari should issue in order that the action of the Circuit Court of Appeals for the Third Circuit may be reviewed.

J. FRED KATZMAIER

THOMAS WOOD

WM. H. WOOD

Counsel for petitioners.

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No. 221

HARRY C. RITTER and CHRIS S. KNAUR,
Petitioners,

v.

WYOGA GAS AND OIL CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SAMUEL S. JENNINGS, JR.,
Counsel for Wyoga Gas & Oil Corporation, Respondent.

GRESSER & WALKER,
RICHARD HENRY KLEIN,
CARL RICE,
RUSSELL S. MACHMER,
Of Counsel.

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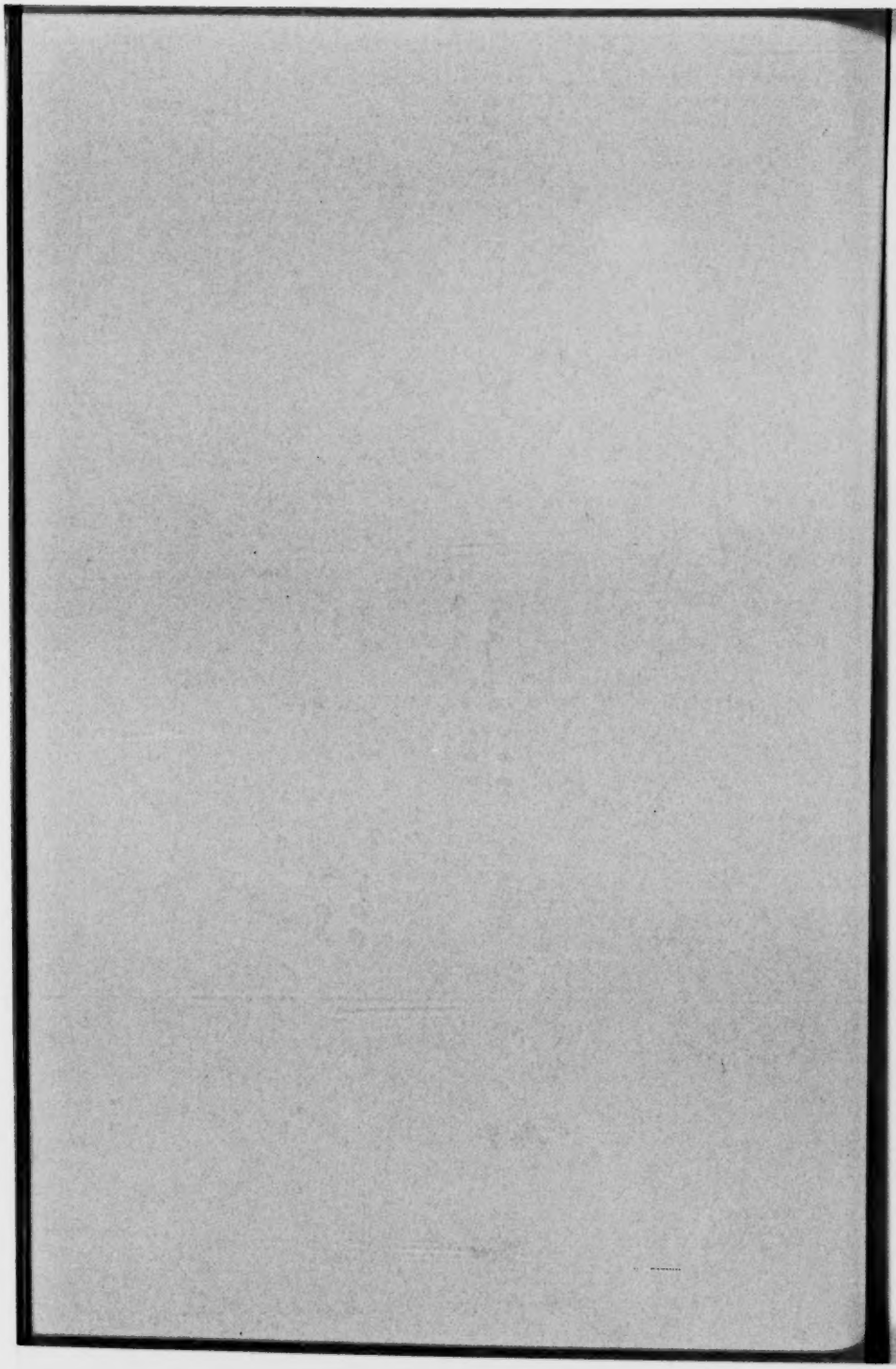

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IN THE

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OCTOBER TERM, 1940.

No.

HARRY C. RITTER and CHRIS S. KNAUB,
Petitioners,

v.

WYOGA GAS AND OIL CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Counter Statement of Question Involved.

Is an order of the District Court refusing a motion to dismiss a complaint upon the ground that the said Court was without jurisdiction to entertain the suit, a final judgment from which an appeal could be taken to the Circuit Court of Appeals?

Counter Statement of the Case.

Wyoga Gas & Oil Corporation, plaintiff in the Court below, filed a complaint in the District Court of the United States for the Middle District of Pennsylvania on December 2, 1938, wherein a number of former directors and officers of the corporation were named as defendants.

The complaint contained nine separate and distinct causes of action, eight of which related to specific transactions and the ninth of which was a general cause of action for an accounting from the defendants. All but two of the defendants, namely Geddes H. Schrack and Bernard Frank, were residents and citizens within the territorial limits of the District Court of the United States for the Middle District of Pennsylvania. Geddes H. Schrack at the time the complaint was filed was a resident and citizen of the State of Ohio, residing in Mansfield, Ohio, and Bernard Frank was a resident and citizen of the State of New York, residing at Long Beach, New York.

The plaintiff is a corporation, organized and existing under the laws of the State of Delaware. The sole basis of Federal Jurisdiction is diversity of citizenship. The various causes of action set forth in the complaint relate to the making of secret profits by the defendants, negligence in acquiring worthless property for the plaintiff corporation and other acts of mismanagement, fraud and negligence in the conduct of their affairs of the corporation.

Two of the defendants, Harry C. Ritter and Chris S. Knaur, the present petitioners, on December 16, 1938 filed a motion to dismiss the complaint upon the ground that all the defendants were not residents within the territorial limits of the District Court of the United States for the Middle District of Pennsylvania, contending that where the sole ground of federal jurisdiction is diversity of citizenship, all of the defendants must be residents in the district in which suit was brought against them. It was also contended, although not specifically set forth in the defendants' motion, that two of the defendants, Geddes H. Schrack and Bernard Frank, are indispensable parties to the action and that by reason of their residence in states other than Pennsylvania, jurisdiction of the Federal District Court was thereby precluded.

On April 3, 1939 the Honorable Albert W. Johnson of the District Court filed an opinion finding that the defendants' contentions were without merit and entered an order refusing the motion to dismiss the complaint and granting the defendants leave to file an answer to the complaint within twenty days. Defendants thereafter, on April 10, 1939, presented a petition for a reargument of the case, which petition was granted. Reargument was had on April 28, 1939. On October 7, 1939, Honorable Albert W. Johnson of the Federal District Court, entered an order again refusing the motion to dismiss the complaint.

From this order an appeal was taken by the defendants, Harry C. Ritter and Chris S. Knaur, to the Circuit Court of Appeals for the Third Circuit. On March 4, 1940 the Circuit Court of Appeals for the Third Circuit dismissed the appeal for the reason that the order appealed from was an interlocutory order. A petition for re-hearing was filed which was denied by that Court on April 12, 1940.

Argument.

The sole question presented by the petition of the defendants, Harry C. Ritter and Chris S. Knaur, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit is whether the order of the District Court of the Middle District of Pennsylvania refusing to dismiss the complaint upon the ground that said Court had no jurisdiction because two of the defendants were non-residents of Pennsylvania, is a final order from which an appeal could be taken to the Circuit Court of Appeals. The Circuit Court of Appeals held the order was interlocutory and therefore not appealable (R. 68-69).

Under Section 128 of the Judicial Code, as amended, Title 28 Sec. 225a (Pocket Parts) U. S. C. A., a Circuit

Court of Appeals has jurisdiction to review by appeal final decisions in the District Court. Under the circumstances presented by this case the Circuit Court of Appeals had no authority to review the decision of the District Court which is interlocutory and not final.

A final judgment or decree from which an appeal may be taken must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance on appeal the Court below would have nothing to do but to execute the judgment or decree it had already rendered. The judgment is not final unless it disposes of the whole case on its merits. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 1 S. Ct. 15, 27 L. Ed. 73.

The decree of the District Court was essentially one refusing to dismiss the complaint because of the alleged lack of jurisdiction of that Court to entertain this action. It obviously was not a final decree.

The right to review rulings on the question of jurisdiction, as a general rule, may not be availed of until after final judgment. An order or judgment overruling a plea to the jurisdiction is not a final judgment from which an appeal lies.

> 2 American Jurisprudence, p. 892, par. 70;
> *Toledo R. & Light Co.* v. *Hill*, 244 U. S. 49, 61 L. Ed. 982, 37 S. Ct. 591;
> *McLish* v. *Roff*, 141 U. S. 661, 35 L. Ed. 893, 12 S. Ct. 118.

An order denying a motion for a dismissal of the action, is, as a general rule, not appealable, since such an order lacks finality, 2 American Jurisprudence, p. 897, par. 80.

In the case of *Grand Trunk Western R. Co.* v. *McHie*, 100 F. 2d. 86 (C. C. A. Sixth Circuit, Nov. 14, 1938) cited by the Circuit Court of Appeals for the Third Circuit, dismissing the appeal in this case, it is clearly held that

the Circuit Court of Appeals has no jurisdiction to entertain an appeal from an order denying a motion to dismiss.

To the same effect are:

Mann v. *Gaddie*, 158 F. 42 (C. C. A. Fifth Circuit);

Rodriguez v. *Arosemena et al.*, 91 F. 2d. 219 (C. C. A. Fifth Circuit, 1937).

Moreover the decision of the Circuit Court of Appeals in this case is not a final decision and therefore no appeal lies to this Court, *Slaker* v. *O'Connor*, 49 S. Ct. 158, 278 U. S. 180, 73 L. Ed. 258.

The decree of the Circuit Court of Appeals for the Third Circuit in this case was correctly entered, and it is respectfully submitted that the petition for a Writ of Certiorari be denied.

SAMUEL S. JENNINGS, JR.,
Counsel for Wyoga Gas & Oil Corporation, Respondent.

GRESSER & WALKER,
RICHARD HENRY KLEIN,
CARL RICE,
RUSSELL S. MACHMER,
Of Counsel.